United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2427-2482

B
Pgs

(41956)

To be argued by
MARK D. LEFKOWITZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74—2427 and 74—2482

Detainees of the Brooklyn House of Detention for Men, RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, THEODORE R. WEST, Warden Brooklyn House of Detention for Men, ABRAHAM D. BEAME, Mayor of New York City, LOWELL B. BELLIN, Health Commissioner and Health Services Administrator of the City of New York, individually and in their official capacities,

Defendants-Appellants.

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, ABRAHAM D. BEAME, Mayor, City of New York, SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-Appellants,
Municipal Building,
New York, New York 10007,
(212) 566-3320 or
(212) 566-4337

L. KEVIN SHERIDAN,
MARK D. LEFKOWITZ,
DONALD J. TOBIAS,
of Counsel.

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 74—2427 and 74—2482

Detainees of the Brooklyn House of Detention for Men, RAYMOND MOCTEZUMA, RONALD FOY, LAWRENCE ODOM, FRANK WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, THEODORE R. WEST, Warden Brooklyn House of Detention for Men, ABRAHAM D. BEAME, Mayor of New York City, LOWELL B. BELLIN, Health Commissioner and Health Services Administrator of the City of New York, individually and in their official capacities,

Defendants-Appellants.

RALPH VALVANO, DONALD LEROLAND and JONATHAN WILLIAMS, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—v.—

BENJAMIN J. MALCOLM, Commissioner of Correction of the City of New York, ABRAHAM D. BEAME, Mayor, City of New York, SALVATORE LATORRE, Warden, Queens House of Detention for Men, individually and in their official capacities,

Defendants-Appellants,

NICHOLAS FERRARO, District Attorney, Queens County,

Defendant.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

(1)

The only point of the Appellees' Brief is that overcrowding, as evidenced by double celling at BHD and QHD, results in deprivations which are constitutionally significant. We submit that the sole issue before this Court is whether

the practice of double celling pre-trial detainees is *per se* unconstitutional. We respectfully remind this Court that Judge Judd declared in his opinion below that double celling was as a matter of law unconstitutional, citing *Inmates of Suffolk County Jail* v. *Eisenstadt,* 360 F. Supp. 676 (D. Mass., 1973), affd. 494 F.2d 1196 (1st Cir., 1974), cert. den. 43 U.S.L.W. 3248 (Oct. 29, 1974). See Appendix 874a-875a.

Examining the cases which the appellees rely upon, particularly *Inmates of Suffolk County Jail* v. *Eisenstadt, supra,* it is clear that the deprivations associated with overcrowding in those cases were neither proved here nor were they in fact explored at trial to any degree. As appellees note in their brief, conditions at BHD and QHD are now the subject of lawsuits pending in the District Court (Appellees' Br., pp. 5-6; 51-52). Certainly, no inference can now be drawn regarding the constitutionality of the conditions challenged during the pendency of these actions. Without such inference or conclusions, we are bound by the record evidence to determine if the deprivations which plaintiffs and their expert witnesses described at trial were unconstitutional. We submit that double celling is not unconstitutional based upon the deprivations proved below and we rely upon our main brief to support this position.

(2)

Without belaboring the point, and relying upon cases already amply discussed in our main brief (at pages 31-38), we respectfully urge that the cases involving alleged overcrowding upon which appellees rely can be distinguished on the basis that the deprivations which in those cases resulted from overcrowding were far more serious than those proved here. The deprivations there involved various life sustaining functions which were inadequately performed by the correction authorities.

One case which appellees rely upon and which illustrates our point is *Taylor* v. *Sterrett,* 344 F. Supp. 411 (N.D. Texas, 1972); affd. in part 499 F.2d 367 (5th Cir., 1974). In *Taylor,* an action brought by pre-trial detainees and convicts, numerous basic life sustaining services at the institution were attacked. The Court described the cells, which were "tanks," as follows (344 F. Supp. at 413):

> "All tanks for men are overcrowded having approximately fifteen more inmates than the number of bunks. Those not assigned to bunks sleep on mattresses in the day room. The hospital ward for men is likewise overcrowded and it is common for men to sleep on mattresses in place of beds. Its capacity is forty-eight. On the day of the Court's visit there were sixty-two persons who had been admitted."

The solitary cells in the institution which were used for punitive segregation and the confinement of insane persons were in poor condition. Only four of these cells had running water and the only facility for excrement was a hole in the floor which was rarely flushed. There was no outside light and the inside electric globe burned 24 hours per day. There were no bunks, just mattresses. The Court also concluded that general medical care facilities were below standard.

The Court stated (at p. 415):

> "When a person is placed in jail he is forced to remain in a cell with no opportunity to engage in recreational activities other than reading and playing cards and dominos. The prisoners have no exposure to either sunlight or fresh air. . . . The overcrowded cells, poor ventilation, poor lighting and lack of exercise all contribute to the physical deterioration of the inmates and these factors also tend to heighten their frustrations and anxieties. There is no opportunity to burn off surplus energy other than by mischievous conduct."

Similarly, in *Holland* v. *Donelon,* Civil Action No. 71-1442 Section "C" (Dist. Ct., E.D., La., 1973), overcrowding, lack of physical exercise, poor sanitation and medical care, disciplinary procedures, treatment of the mentally ill, lack of a classification system, poor or non-existent fire prevention equipment and procedures, and segregation within the institution, came under sharp attack.

The cases upon which appellees rely do point out that overcrowding, and, hence, double celling, can lead to deprivations of constitutional significance where the institution as a result of the overcrowding is unable to support the basic human needs of its inhabitants. These basic human needs relate solely to food, sanitation, and the physical and mental health of its inhabitants. The record evidence here fails to show that these basic human needs are not adequately provided for at BHD and QHD. To the contrary, Judge JUDD took cognizance of all the various activities available to inmates at the institutions (See Appendix, pp. 872a-873a). In fact, as to one of the alleged "deprivations" which was directly a result of overcrowding, namely the eating of meals in cells, the Court dismissed this contention, stating (Appendix 876a):

> "The discomfort or indignity of eating in a cell is not a constitutional violation within the general principles laid down in *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049, 92 S. Ct. 719, 405 U.S. 978, 92 S. Ct. 1190 (1972). Nor can it be described as cruel and unusual punishment." *Rhem* v. *Malcolm,* 371 F. Supp. 594, 624 (S.D. N.Y. 1974).

We respectfully submit that Judge JUDD's treatment of the issue of feeding in the cells should have been similarly applied to the other alleged deprivations.

Lastly, we uge that the "deprivations" proved at trial were, based upon inmate and expert testimony, inconclusive

and highly subjective. They were not constitutionally significant because the inmates have not been deprived of any basic human needs to which they are entitled.

CONCLUSION

The judgment and order appealed from should be reversed.

February 25, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel,
Attorney for Defendants-Appellants.

L. KEVIN SHERIDAN,
MARK D. LEFKOWITZ,
DONALD J. TOBIAS,
of Counsel.

(57603)

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Chester Mitchell

being duly sworn, says that on the 25 day of FEB 19 75

at No. 15 PARK ROW in the Borough of MAN in New York City, he served a copy

of the annexed APPELLANT'S REPLY BRIEF upon LEGAL AID SOCIETY Esq.,

the Attorney for the PLAINTIFF'S - APPELLEES in the within entitled action, by delivering

a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 25
day of Feb 19 75

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 329-3M-123057(61)